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# Supreme Court of the United States

**October Term 1964**

**No. 355**

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Petitioners,*

*against*

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Petitioners,*

*against*

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Petitioners,*

*against*

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

(Other titles continued on back of front cover.)

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Petitioners,*

*against*

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondent.*

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Civil File No. 153-194

JOSEPH P. PHELAN, *Petitioner,*

*against*

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

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Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Petitioners,*

*against*

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

# INDEX


| | PAGE |
|---|---|
| Statement | 1-4 |
| POINT ONE—Hood did not participate in any illegal conspiratorial boycott with respect to direct sales to petitioners or engage in any other violations of the antitrust laws | 5-14 |
| I—The five Carvel-Hood supply contracts are not illegal per se or otherwise | 5-6 |
| II—Carvel's requirement that Hood deliver no ice cream mix or ice cream preparation other than Carvel mix to the Carvel stores is necessary and proper to protect both Carvel and the consuming public and is in no sense illegal | 7-9 |
| III—The provision that Hood manufacture Carvel mix exclusively for Carvel, in accordance with Carvel's special secret formula, and supply Carvel with all of its requirements in a specified area, is also patently proper | 9-10 |
| IV—Both of the Courts below held that the Carvel-Hood supply contracts did not involve any violations of antitrust laws | 11-14 |
| POINT TWO—Petitioners have not advanced a single reason for granting a review of the decision below in favor of Hood and their petition for a writ of certiorari should be denied | 14 |

CITATIONS

PAGE

Cases:

*Bascom Launder Corp.* v. *Telecoin Corporation,* 204 F. 2d 331 (2d Cir. 1953), *cert. denied,* 345 U. S. 994 (1953) ---------- 10

*Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958) ---------- 4

*Packard Motor Car Co.* v. *Webster Motor Car Co.,* 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied,* 355 U. S. 822 (1957) ---------- 10, 13, 14

*Schwing Motor Car Co.* v. *Hudson Sales Corp.,* 138 F. Supp. 899 (D. Md.) *aff'd per curiam,* 239 F. 2d 176 (4th Cir. 1956), *cert. denied,* 355 U. S. 823 (1957) ---------- 14

*Susser* v. *Carvel Corporation,* 206 F. Supp. 636 (S. D. N. Y. 1962) ---------- 11, 12, 13, 14

*Susser* v. *Carvel Corporation,* 332 F. 2d 505 (2d Cir. 1964) ---------- 12, 13

*Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U. S. 320 (1961) ---------- 10, 11

*United States* v. *Bausch & Lomb Optical Co.,* 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court,* 321 U. S. 707 (1944) ---------- 10

*United States* v. *Columbia Steel,* 334 U. S. 495 (1948) ---------- 11

*United States* v. *Ekco Products,* 1957 CCH Trade Cases, para. 68,768, p. 73,129 (N. D. Cal., 1957) ---------- 9

# Supreme Court of the United States

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No. 355

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BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ,

*Petitioners,*

*against*

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS,

*Respondents.*

and Five other Actions

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT, H. P. HOOD & SONS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Statement

The petitioners request this Court to review the decision and judgment of the Court of Appeals, Second Circuit, which affirmed judgments of the District Court, Southern District of New York, dismissing nine actions in which the petitioners claim treble damages for alleged violation of the antitrust laws.

The respondent, H. P. Hood & Sons, Inc. ("Hood"), which is engaged in the manufacture and sale of dairy products, was a defendant in six of those nine actions. The nine actions were tried by the Court, without a jury, and the six complaints against Hood and other defendants were dismissed.*

The petitioners, plaintiffs in those six actions, are the operators, under franchise agreements, of Carvel retail ice cream stores. In each of the stores, petitioners sold to the public Carvel frozen dairy products, manufactured by petitioners, using as the basic component Carvel's Special Formula Ice Cream Mix, processed by Hood for Carvel.

Petitioners' six actions were brought primarily against the Carvel Corporation and several of its subsidiaries, collectively referred to as "Carvel". But petitioners also joined, as defendants, certain independent companies of whom Hood is one, which furnish supplies to the Carvel companies and deliver those supplies on Carvel's instructions, directly to the Carvel retail stores. These peripheral defendants are sometimes referred to collectively in the opinions below as the "supplier defendants."

In addition to plaintiffs' claims based upon the antitrust laws, the complaints originally contained claims against the Carvel defendants *only,* alleging that plaintiffs had been induced by fraud on the part of Carvel to enter into the franchise agreements with Carvel. These fraud claims, however, were severed

* Separate judgments in favor of the supplier defendants were entered at the direction of the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

from the antitrust claims and were tried before the District Court without a jury. But Hood was never charged with any fraud and took no part in that trial. The District Court directed that those fraud claims against Carvel be dismissed.

Petitioners abandoned before trial their original far-flung allegations of conspiracy between Carvel and the supplier defendants. Also, by Pretrial Order they agreed that they "make no claim other than that their evidence will establish *per se* violations of the antitrust laws." They further agreed that their evidence at the trial would be limtied to: written agreements entered into between the Carvel defendants and the plaintiffs and supplementary or explanatory documents; and to written agreements between the Carvel defendants and the supplier defendants, including Hood. (Pretrial Order No. 5,—R, III, 15c*; also quoted Op. A-22, A-23**)

But none of the agreements between Carvel and the plaintiffs contains any mention of Hood. The only agreements which mention Hood are five Carvel-Hood supply contracts. The sole issue pertaining to Hood, therefore, is whether these supply contracts evidence agreements or practices which constitute *per se* violations of the antitrust laws.

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* Letter "R", followed by Roman numeral indicating volume and Arabic numeral indicating page, refers to the certified appendix record filed in this Court by the Petitioners.

** Hereinafter references to the opinions below will be to pages of the Appendix to the Petition A-1 to A-29 (Court of Appeals), and A-30 to A-60 (District Court).

To sustain such violations against Hood, petitioners must establish that these supply contracts evidence one of those:

> "* * * agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 5 (1958).

The Carvel-Hood supply contracts evidence no such agreements or practices. Both Courts below so held.

Petitioners expressly declared that they do not charge that Hood and the supplier defendants engaged in any general or common conspiracy with Carvel and with each other in furtherance of violations of anti-trust laws. The alleged liability of Hood therefore is predicated upon the theory of a separate unlawful conspiracy on the part of Hood *with Carvel* not to sell direct to petitioners.

Conformably the District Court stated in its opinion (Op., A-37):

> "The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendant engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies."

## POINT ONE

**Hood did not participate in any illegal conspiratorial boycott with respect to direct sales to petitioners or engage in any other violations of the antitrust laws.**

### I

**The five Carvel-Hood supply contracts are not illegal per se or otherwise.**

Carvel engaged Hood, a well known supplier of quality dairy products, to process for Carvel all of its requirements of a special type and kind of ice cream mix to be made according to Carvel's special recipe or formula and to deliver this mix to Carvel retail stores to be located in Massachusetts and Connecticut.

The basic provisions here pertinent incorporated in all of the supply contracts between Hood and Carvel, are: that Carvel shall furnish Hood with a certain secret and confidential mix formula, calling for the highest quality ingredients; that Hood shall manufacture this mix in strict compliance with that formula; that Hood shall deliver only Carvel mix to Carvel stores and no other mix or ice cream preparation; that Hood shall sell this mix only to Carvel; and that Hood shall not reveal without Carvel's authorization the contents of the secret formula to any other person. (Contract—R, III, 139c-153c)

The following facts were established at the trial without contradiction both by stipulation of the parties and by the uncontroverted testimony of Hood's witness, Walter Simonsen, Hood's ice cream mix sales manager (Stip., R, III, 51c-54c; W. Simonsen, R, III, 55c-72c):

> Hood did not participate in the negotiations for or in the preparation and execution of Carvel's

franchise or other agreements with its store operators; and Hood was not a party to and had no knowledge of any of those agreements.

Hood did not participate in the negotiations for or in the preparation or execution of any agreement between Carvel and any other supplier; and Hood was not a party to and had no knowledge of any of those agreements.

Hood did not participate in any way in the preparation of the Carvel S.O.P. Manual; never saw and had no knowledge of that Manual; and had nothing whatsoever to do with the manner in which the Carvel stores were operated.

The Carvel mix manufactured by Hood for Carvel is processed according to Carvel's special secret formula, the stabilizer and emulsifier being supplied by Carvel; and the mix differs from all other ice cream mixes manufactured by Hood.

Hood did not participate in the determination of the prices at which Carvel sold its ice cream mix to its store operators or in the determination of any of the other conditions of sale to those operators.

The Carvel stores do not sell ice cream mix to the public in the form in which it is delivered by Hood to the stores; and the mix is used only as a component of various frozen dairy products manufactured by the store operators.

Hood never participated in any way in the determination of the prices charged to the public by the operators of Carvel stores for the frozen dairy products manufactured and sold by the Carvel stores to the public.

## II

**Carvel's requirement that Hood deliver no ice cream mix or ice cream preparation other than Carvel mix to the Carvel stores is necessary and proper to protect both Carvel and the consuming public and is in no sense illegal.**

The provisions that Hood would deliver no ice cream mix or ice cream preparation other than Carvel mix to Carvel stores was obviously necessary to protect the public against possible fraudulent imposition.

All Carvel stores display a large exterior sign bearing the name "CARVEL" and in most instances a replica of a Carvel ice cream cone. Moreover, the name "CARVEL" appears on much of the equipment contained within the stores and is imprinted on the menus, bulletins, placards and advertisements placed in or about the stores. Thus the name "CARVEL" has come to be identified indelibly in the public mind only with quality ice cream products sponsored by Carvel and sold in Carvel stores. (Op. A-35, A-36)

The public had a right to expect, and undoubtedly does expect, that Carvel stands behind the products which are sold at these stores, and that it exercises proper control to insure that these products conform to high standards of taste, quality and healthfulness.

Moreover, each store operator benefits from the continued high reputation of Carvel. For customers who have no knowledge of the particular store or of its franchise operators will, nevertheless, stop and make purchases because of the Carvel reputation. (Op. A-36)

In order to insure that all products sold at Carvel stores will conform to Carvel's high standards and fulfill the public expectations which Carvel has created, Carvel itself must control the supply of ice cream mix to the stores. Therefore, because Hood and not Carvel processes the mix delivered to the Carvel stores in Connecticut and Massachusetts, Hood is required to follow the secret formula originated and supplied to it by Carvel.

Further, in order to insure that the store operators will use only Carvel mix and not some other mix prepared according to different or varying standards, Carvel has contracted with Hood that Hood will deliver only Carvel mix and no other ice cream mix or ice cream preparation to Carvel stores. (Contract par. 5(f), R, III, 142c)

Thus, it is readily seen that this requirement is soundly in the public interest. For Hood to breach its agreement with Carvel, as petitioners seem to contend it should, might well make Hood an accomplice in a fraudulent imposition upon the public.

Any misrepresentation of food products, particularly of highly perishable products such as frozen dairy products, is a matter of vital public concern. The public must rely upon the integrity of the organization under whose name and sponsorship a food product is sold, for protection from inferior, unsavory and possibly unhealthful products. That this is so is confirmed by Section 19-202 of Chapter 341 of the General Statutes of Connecticut. (R, III, 240c) And, substantially identical language appears in Section 65L

(b) of Chapter 94, Title XV of the General Laws of Massachusetts. (R, III, 238c-239c)

If Hood were to deliver an ice cream mix other than the Carvel mix to Carvel stores, and if such mix were to be placed in Carvel mix machines, and the products made therefrom sold to the public under the Carvel name, such conduct could subject both Hood and the store operators to liability under those Massachusetts and Connecticut statutes.

Clearly the requirement that Hood deliver no ice cream preparation other than Carvel mix to the Carvel stores is not "pernicious" in any sense, and, on the contrary, possesses striking affirmative virtues. It merely would prohibit a practice which would be so clearly in violation of the public interest that it could not possibly be justified on any theory.

## III

**The provision that Hood manufacture Carvel mix exclusively for Carvel, in accordance with Carvel's special secret formula, and supply Carvel with all of its requirements in a specified area, is also patently proper.**

The Carvel-Hood contracts provide that Hood shall manufacture a particular type of ice cream mix exclusively for Carvel, according to specifications provided by Carvel.

The lack of authority for any contention that this type of exclusive arrangement constitutes a *per se* violation of the antitrust laws is indicated by the terms of a consent decree in *United States* v. *Ecko Products,*

1957 CCH Trade Cases, para. 68,768 (N. D. Cal., 1957), which provides, among other things:

> "Nothing in this Section VIII shall be deemed to prevent defendants from contracting for the manufacture *exclusively for them* of specific silicone compounds in accordance with the formulas and specifications furnished by defendants." (Emphasis supplied; p. 73,129)

Certainly the Department of Justice would not have consented to a decree which specifically permitted a practice which might, on any theory, be considered a *per se* violation of the antitrust laws.

The legality of the arrangement here involved is further clear from *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), *cert. denied*, 355 U. S. 822 (1957).

Other authorities which unmistakably indicate the legality of the Carvel-Hood supply contracts include: *Bascom Launder Corp.* v. *Telecoin Corporation*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953), and *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), *aff'd by an equally divided Court*, 321 U. S. 707 (1944).

The Carvel-Hood supply contracts provide that Carvel will purchase from Hood all its requirements of Carvel mix in a specified area. This provision does not constitute a *per se* violation or any violation of the antitrust laws. The fact that requirements contracts are not *per se* illegal was made irresistibly clear by the decision of this Court in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

## IV

**Both of the Courts below held that the Carvel-Hood supply contracts did not involve any violations of antitrust laws.**

Clearly, neither the Carvel-Hood supply contracts nor any of Hood's conduct pursuant to them constitute a *per se* or other violation of the antitrust laws. On the contrary, Hood's proof affirmatively establishes: that these contracts have many patent virtues and require no redemptive justification; and that they are all reasonable and proper for the protection of the legitimate proprietary interests both of Carvel and of the store operators themselves—as well as the interests of the consuming public. And there is no proof whatsoever that the contracts have any adverse effect upon competition, much less a "pernicious" effect.

As the District Court said in its opinion (Op., A-38):

> "It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel. . . . the plaintiffs failed to prove that such provisions were in fact illegal. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1960); *United States* v. *Columbia Steel*, 334 U. S. 495 (1948).
>
> "As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious."

The District Court also said with respect to plaintiffs' alleged second possible basis for liability (Op., A-39):

> "As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix . . . or other than Carvel approved merchandise . . . As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores . . ."

The District Court then found that plaintiffs' argument that the provisions of the supply contracts are illegal must fail for several reasons and pointed out, among other things: that plaintiffs had failed to prove that they had asked any of the supplier defendants to make sales of unapproved merchandise and that they refused to do so; and that the plaintiffs had made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived them of any access to these goods. In conclusion the Court stated:

> ". . . plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defendants and the case against them must therefore be dismissed." (Op., A-40)

The Court of Appeals unanimously affirmed, in all respects, the foregoing views of the District Court. As to the agreement that Hood would produce ice cream mix under Carvel's secret formula which Hood pledged

itself not to divulge, Chief Judge Lumbard, speaking for the Court of Appeals, said (Op., A-21):

> "With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition."

As to the agreement by Hood not to sell non-Carvel products to the store operators, the Court of Appeals further said (Op., A-21, A-22):

> "As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the suppliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused."

Judge Dawson in the District Court had similarly held that even if the supplier defendants agreed with

Carvel not to sell other than Carvel approved products to the franchise operators such agreement by two persons not in competition with each other would not have constituted an illegal boycott, citing: *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957). (Op., A-39, A-40)

## POINT TWO

**Petitioners have not advanced a single reason for granting a review of the decision below in favor of Hood and their petition for a writ of certiorari should be denied.**

The petition for review of the unanimous affirmance by the Court of Appeals of the District Court's decision in favor of Hood presents, as to it, separate and clearly defined questions. But not a single argument or reason has been advanced to support any contention that the decision below in favor of Hood is in any respect erroneous and should be reviewed. We submit that the case against Hood should now be terminated without further review and that the writ of certiorari should be denied.

Dated: New York, N. Y.
September 11, 1964

Respectfully submitted,

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